Nadarajan s/o Verayan v Hong Tuan Teck (Part 1)

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO R-17B–18 OF 2005
ABDUL MALIK ISHAK J
16 MARCH 2007

Civil Procedure — Time — Extension of time — Whether application for extension of time to file notice of appeal can be made under O 3 r 5 of the Rules of the High Court 1980

Legal Profession — Disciplinary proceedings — Disciplinary Committee — Conviction of advocate and solicitor — Striking off the Roll — Appeal — Delay in filing notice of appeal — Whether grounds for granting extension of time to file notice of appeal existed — Whether appeal maintainable

The applicant/appellant, an Advocate and Solicitor of the High Court of Malaya was struck off the Roll of Advocates and Solicitors of the High Court of Malaya pursuant to a decision by the Disciplinary Board ('DB') on 31 March 2005. The applicant/appellant then filed a notice of appeal on 16 May 2005 pursuant to s 103E of the Legal Profession Act 1976. As there was a delay of about 17 days in the filing of the notice of appeal, the applicant/appellant filed an application for extension of time pursuant to O 3 r 5 of the Rules of the High Court 1980 ('the RHC'). At the commencement of the hearing of the application, learned counsel for the applicant/appellant, Mr Manokaran, objected to the presence of the counsels for the DB, namely, Mr Su Tiang Joo and Ms Michelle Ong on the ground that the DB was not a party to the proceeding. The court, however, upon due consideration then invited counsels for the DB to participate in the proceeding as amicus curiae.

Held, dismissing the application and appeal:

(1) The present application cannot be made under O 3 r 5 of the Rules of the High Court ('the RHC'). The applicant cannot have resort to the RHC as the time limit of one month for lodging the appeal is prescribed by an Act of Parliament and not by any provision of the RHC or by any other subsidiary legislation. The present application should have been made under s 25(2) and para 8 of the Schedule to the Courts of Judicature Act 1976 (see para 7).

(2) There is no merit in the present application for an extension of time. Based on the documentary evidence, the appellant at all material times had knowledge of the disciplinary proceedings against him but had refused to attend the hearing of the same. The applicant/appellant was also duly notified of the decision of the DB (see para 8).

(3) In the present case, the delay is substantial. The delay is more than two weeks and was not due to mere oversight or inadvertence. It was due to the 'couldn't care less' attitude of the applicant/appellant himself. He had shown scant respect for the disciplinary proceedings against him. Besides the time factor, the applicant's conduct was also a relevant factor in deciding whether or not an extension of time ought to be granted (see para 10).

(4) As the application for an extension of time is refused, it would follow therefore that the appeal is no longer maintainable and must also be dismissed (see para 12).

[Bahasa Malaysia summary

Pemohon/perayu, seorang Peguambela dan Peguamcara di Mahkamah Tinggi Malaya telah dibatalkan daripada Daftar Peguambela dan Peguamcara Mahkamah Tinggi Malaya menurut keputusan oleh Lembaga Tatatertib ('LT') pada 31 Mac 2005. Pemohon/perayu telah memfailkan notis rayuan pada 16 Mei 2005 menurut kepada s 103E Akta Profesyen Undang-Undang 1976. Oleh kerana terdapat kelewatan selama 17 hari dalam mefailkan notis rayuan, pemohon/perayu telah memfailkan permohonan perlanjutan masa menurut A 3 k 5 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Pada permulaan pendengaran permohonan, peguam terpelajar untuk pemohon/perayu, En Manokaran, telah menentang kehadiran peguam-peguam kerana LT bukanlah pihak kepada prosiding. Mahkamah walaubagaimanapun, selepas pertimbangan sewajarnya kemudian mempelawa peguam-peguam untuk LT mengambil bahagian dalam prosiding sebagai amicus curiae

Diputuskan, menolak permohonan dan rayuan:

(1) Permohonan sekarang tidak boleh dibuat di bawah A 3 k 5 KMT. Pemohon tidak boleh menggunakan KMT kerana tempoh masa selama sebulan untuk mengemukakan rayuan ada ditetapkan oleh Akta Parlimen dan tidak melalui sebarang peruntukan KMT atau dengan perundangan subsidiari. Permohonan sekarang hendaklah dibuat di bawah s 25(2) dan perenggan 8 dalam Jadual Akta Mahkamah Kehakiman 1976 (lihat perenggan 7).

(2) Tidak ada merit dalam permohonan sekarang untuk perlanjutan masa. Berdasarkan kepada keterangan dokumentari, perayu pada setiap masa material mempunyai pengetahuan kepada prosiding disiplin terhadapnya tetapi menolak untuk hadir bagi pendengaran yang sama. Pemohon/perayu juga telah dimaklumkan mengenai keputusan LT (lihat perenggan 8).

(3) Dalam kes sekarang, kelewatan adalah penting. Kelewatan adalah lebih daripada dua minggu dan bukan disebabkan oleh terlepas pandang atau kelalaian. Ia adalah disebabkan sikap 'tidak ambil peduli' pemohon/perayu sendiri. Beliau telah menunjukkan kurang hormat kepada prosiding disiplin terhadapnya. Selain daripada faktor masa, kelakuan pemohon juga adalah faktor relevan bagi memutuskan sama ada perlanjutan masa harus dipenuhi (lihat perenggan 10).

(4) Oleh kerana permohonan untuk perlanjutan masa telah ditolak, oleh itu ia akan diikuti bahawa rayuan tidak lagi boleh dikekalkan dan juga mesti ditolak (lihat perenggan 12).]

Notes

For cases on extension of time, see 2(3) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 7735–7780.

For cases on Disciplinary Committee, see 9 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1589–1590.

Legislation referred to

Courts of Judicature Act 1964 s 25(2), para 8 of the Schedule
Legal Profession Act 1976 s 103E
Legal Profession (Disciplinary Proceedings) (Appeal) Rules 1994 r 9
Rules of the High Court 1980 O 3 r 5

V Manoharan (Chong Phow Yew with him) (Nordin Torji & Partners) for the applicant/appellant.
Su Tiang Joo (Michelle SP Ong with him) (Cheah Teh & Su) for the respondent.

Abdul Malik Ishak J (now JCA):

[1] Enclosure 4 is an application by the applicant/appellant for an extension of time to file his notice of appeal against the decision of the Disciplinary Board ('the DB') given on 31 March 2005.

[2] At the commencement of the hearing of this application on 26 September 2005, the learned counsel for the applicant/appellant, Mr Manokaran, objected to the presence of the counsel for the DB, namely, Mr Su Tiang Joo and Ms Michelle Ong on the ground that the DB is not a party to the proceeding.

[3] Mr Su, however, informed the court that he and Ms Ong were before the court merely as counsel for a party (the DB) that had been served with the cause papers by the appellant; or, alternatively, he (and his co-counsel) was before the court, on behalf of the DB, as a friend of the court (that is to say as amicus curiae). Mr Su made it clear to the court that he was not taking a partisan stand and that he was before the court merely to bring to the attention of the court all the materials available before the DB pertaining to the applicant's case.

[4] Considering that the counsel for the applicant/appellant appears to have no strong objection to Mr Su and Ms Ong appearing merely as *amicus curiae,* and that Mr Su and Ms Ong themselves were contented to appear merely as amicus curiae, the court, accordingly, on 27 February 2006, invited Mr Su and his junior to participate in the proceeding as amicus curiae. As amicus curiae, Mr Su's contribution was very helpful to the court in arriving at a decision.

[5] The applicant/appellant was an Advocate and Solicitor of the High Court of Malaya. The DB had on 31 March 2005 made a decision that he be struck off the Roll of Advocates and Solicitors of the High Court of Malaya.

[6] The notice of appeal was filed on 16 May 2005. It was filed pursuant to s 103E of the Legal Profession Act 1976. As required by the said provision of the Legal Profession Act, the notice of appeal must be filed within one month of the date of decision. As it was filed only on 16 May 2005, thus, there has been a delay of about 17 days in the filing of the notice of appeal. Hence, the applicant/appellant filed the present application for extension of time. The present application was also filed on the same day as the notice of appeal.

[7] The appellant/applicant makes this application pursuant to O 3 r 5 of the Rules of the High Court 1980 ('the RHC'). With respect, it is my view that the present application cannot be made under O 3 r 5 of the RHC, being only a subsidiary legislation, the applicant cannot have resort to it, as the time limit of one month for lodging the appeal is prescribed by an Act of Parliament and not by any provision of the RHC or by any other subsidiary legislation. In my opinion, the present application should have been made under s 25(2) and para 8 of the Schedule to the Courts of Judicature Act 1964.

[8] I am in agreement with my learned brother judge, Abdul Malik Ishak J (now JCA), that there is no merit in the present application for an extension of time, and that this application, accordingly, be dismissed with costs. I share

his finding that, based on the documentary evidence, the appellant at all material times had knowledge of the disciplinary proceedings against him, but had refused to attend the hearing of the same. In the light of such a conduct on his part, it is not open to him to now say that he was not aware of the proceedings or of the decision of the DB.

[9] I am also satisfied that he was duly notified of the decision of the DB. The decision of the DB was duly sent to his last known residential address both by registered post and ordinary post, as required by r 9 of the Legal Profession (Disciplinary Proceedings) (Appeal) Rules 1994. Both letters were posted on 31 March 2005. None of the letters was returned undelivered. It is fair to infer that he had received those letters.

[10] In the present case, the delay is substantial. The delay is more than two weeks. And to add to the seriousness of the matter, the delay was not due to mere oversight or inadvertence. It was due to the 'couldn't care less' attitude of the applicant/appellant himself. He had shown scant respect for the disciplinary proceedings against him. My learned brother, Abdul Malik Ishak J, has dwelt on this issue in detail. I do not propose to repeat on what he has deliberated except to say that, besides the time factor, the applicant's conduct is also a relevant factor in deciding whether or not an extension of time ought to be granted.

[11] In arriving at the above decision that there is no merit in the present application for the extension of time, I find it unnecessary to consider the merits of the appeal.

[12] As the application for an extension of time is refused, it would follow therefore that the appeal is no longer maintainable, and hence must also be dismissed.

Appeal dismissed.

Reported by Eugene Daniel Louis